No. 2591

United States Circuit Court

of Appeals

For the Ninth District

SMITH POWERS LOGGING CO., a corporation, and C. A. SMITH LUMBER & MANUFACTURING COMPANY, a corporation,

Appellants,

vs.

E. W. BERNITT and VICTOR WITTICK,

Appellees.

APPELLANT'S BRIEF

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STATEMENT OF CASE

This is an appeal from a decree of the United States District Court for the District of Oregon. Appellees brought their suit in equity alleging that about the year 1882 E. B. Dean, David Willcox and C. H. Merchant, a co-partnership known as E. B. Dean & Co., of the one part, and E. W. Bernitt, Wm. Klahn, George Wulff and David Young, of the other part, entered into a partnership agreement, in pursuance of which a certain log boom was constructed partly on lands owned by the said E. B. Dean &

Co., and partly on other lands not then so owned.

The complaint further alleged that the said Bernitt, Klahn, Wulff and Young were to do all the rafting, for which a charge was exacted in addition to the boomage charge. That E. B. Dean & Co., were to have a one-half interest in the boomage charge, after paying half the cost of maintenance, and each of the other parties were to receive a one-eighth interest in the boomage charge, after each contributing one-eighth of the cost of maintenance.

The complaint further alleged that by numerous sales and transfers set forth in the complaint, Bernitt & Wittick succeeded to the interests of Bernitt, Klahn, Wulff and Young. That about the year 1897 the firm of E. B. Dean & Co., was dissolved by reason of the death of David Willcox, and the partnership property of said E. B. Dean & Co., was sold to Dean Lumber Co., a California corporation; that thereafter said partnership property of E. B. Dean & Co., was sold and transferred to C. A. Smith, one of the defendants in the present suit; that said C. A. Smith thereafter sold his interest in the tidelands and boom to the defendant Smith-Powers Logging Company; that upon the sale and purchase by the Dean Lumber Company from E. B. Dean & Co., said Dean Lumber Company continued to act in the joint operation and management of said boom in conformity with the said alleged partnership agreement, and that said C. A. Smith and Smith-Powers Logging

Company also continued to act in the joint management, operation, control, possession and ownership of said boom and property with the plaintiffs up to and until March, 1909, at which time the Smith-Powers Logging Company claimed to own said boom, and that since June, 1909, the Smith-Powers Logging Company has taken exclusive possession of said boom, and prevents the plaintiffs from using the same, or any portion thereof.

The complaint further alleged a secret agreement or understanding between C. A. Smith and the Smith-Powers Logging Company and C. A. Smith Lumber & Manufacturing Company to prevent the plaintiffs from using the boom, and that they refused to account to the plaintiffs or pay their proportion of the earnings of the boom.

The complaint further sets forth that the plaintiffs are entitled to certain amounts of money for boomage and rafting, and asks for an accounting and judgment for any amount found to be due, and further asks that a receiver be appointed for said boom, and that if the court find that said property cannot be partitioned without materially destroying its value, that said receiver be ordered to sell the premises and property.

The answer admits that about the year 1882 E. B. Dean, David Willcox and C. H. Merchant were co-partners, doing business under the firm name and style of E. B. Dean & Co., but denies that the said co-partnership ever entered into any partnership

agreement with Bernitt, Klahn, Wulff and Young as set forth in the complaint and alleges that the agreement was merely that the said Bernitt, Klahn, Wulff and Young were to be allowed the use of said boom, and to go in said booms and remove logs and piling stored therein for various persons and companies doing business upon the waters of Coos Bay, and to take and raft away logs and pilings so caught in said boom, and for said privilege and for said uses of said boom the parties last named were to, and did, assist with their labor, in a small measure, in the erection of said booms, and were to, and did, keep said booms in such state of repair as to permit of its continued use, and that the said Bernitt, Klahn, Wulff and Young were associated together in said use of said boom, and were accustomed to and did charge for all logs or timber caught therein the sum of twelve and one-half cents per thousand feet, board measure, and one-eighth of a cent per lineal foot for piling for so catching, storing and sorting said logs, and that the owners of all said logs and piling paid to E. B. Dean & Co., a like sum of twelve and one-half cents per thousand feet, board measure, for all logs, and one-eighth of a cent per lineal foot for all piling, the sums so paid to E. B. Dean & Co., being as rental for the use of said boom.

The answer further alleges that in the various transfers by which Bernitt & Wittick claimed their interest, the several persons so purchasing their interests mutually understood that the parties pur-

chasing could not without consent of E. B. Dean & Co., continue to use said boom in connection with the rafting and logging business carried on by said Bernitt, Klahn, Wulff and Young; and their successors, and the said several parties to said purchasers and sales never at any time claimed any partnership with E. B. Dean & Co., but sold and claimed to sell only logging gear, boats, ropes and similar appliances, and that none of them ever signed any articles of partnership or considered themselves or acted as partners of the said E. B. Dean & Co.

The answer admits that in 1897 the firm of E. B. Dean & Co., was dissolved by reason of the death of David Willcox, and that thereafter the partnership property of said E. B. Dean & Co., was sold and transferred to the Dean Lumber Company, a California corporation, who transferred the same to C. A. Smith; and alleges that the said C. A. Smith thereafter sold all of the said partnership property to the Smith-Powers Logging Company.

The answer further denies that the Dean Lumber Company ever acted with Bernitt & Wittick, or their grantors, in the joint operation and management of said boom, and in conformity with any partnership agreement, and alleges that the said Dean Lumber Company, after purchasing said partnership property from E. B. Dean & Co., merely allowed the plaintiffs and their original grantors to use said boom pursuant to the agreement set forth in the answer, and not in conformity or attempted con-

formity to any partnership agreement whatsoever.

The answer further denies that C. A. Smith or the Smith-Powers Logging Company ever acted with Bernitt & Wittick in the joint management, operation, control, possession or ownership of said boom, and alleges that said C. A. Smith and Smith-Powers Logging Company had no notice, knowledge or intimation that the said Bernitt & Wittick ever claimed or pretended to have any interest whatsoever in said booms until the month of October, 1907, and immediately upon hearing of such claim, the said Smith-Powers Logging Company, which was then in the possession, control and management of said property, notified plaintiffs Bernitt & Wittick that they had no right, title, interest or ownership in said boom; that said C. A. Smith never controlled or operated said boom, but at all times while the title to the same rested in him, entrusted the management and control of said boom to the Smith-Powers Logging Company, and alleges that after said boom was purchased by said C. A. Smith, Bernitt & Wittick claimed and represented to said Smith that they had been using said boom and rafting logs therefrom under an arrangement with the former owners thereof substantially as set forth in the answer.

The answer admits that C. A. Smith is a director and is president of the Smith-Powers Logging Company, and also of the C. A. Smith Lumber & Manufacturing Company, but denies that he is the managing owner of either of said corporations, and al-

leges that the defendant C. A. Smith Lumber & Manufacturing Company at no time owned or claimed, and does not now own or claim any right, title or interest in or to said boom or said property, or any part thereof.

The answer further denied that there was any secret agreement or understanding to prevent the plaintiffs from using said property or property rights, and denied that plaintiffs were entitled to any accounting or any of the sums claimed in the complaint.

The answer further alleges that neither Bernitt & Wittick, or their grantors, or the said E. B. Dean & Co., or Dean Lumber Company, ever had or received, and that there was never issued to them, or to anyone for them, or otherwise, any permit from the War Department of the United States, or from any lawful authority, for the erection or maintenance of said boom, or any portion thereof, or any of the piling or other property constituting said boom, and that said booms other than those erected by the defendants were erected and maintained in the navigable waters of Coos Bay and of Coos River in Coos County, Oregon, contrary to and in violation of the laws of the United States, and particularly of an Act of Congress, passed September 19, 1890, and acts amendatory thereto, and were at all times illegal, unauthorized and unlawful; and the answer further alleged that at the time the boom was purchased by C. A. Smith, and at the time Smith-Pow-

ers Logging Company took possession thereof, said piling, dolphins and boom sticks constituting said boom, were decayed, dilapidated and in such a state of disrepair that they were practically valueless, unsafe and unsuitable for the purposes for which they were intended. That the plaintiffs had failed and neglected to repair or maintain said boom, and that since the Smith-Powers Logging Company took possession thereof, the said defendants had obtained proper and legal permits from the proper authorities of the United States Government for the maintenance of booms, and that pursuant to such permits, had erected proper and legal booms and necessarily expended therefor the sum of $9,891.02; that as a condition precedent to allowing the erection of said boom, the War Department of the United States required the said Smith-Powers Logging Company to remove from the channel of said Coos River, dolphins, cribs and piling whatsoever placed in said channel and forming a portion of said former illegal boom, and that in so doing and complying with said conditions and removing the said obstructions, said Smith-Powers Logging Company necessarily expended the sum of $600; that in order to secure a permit for the erection of said boom, it was necessary that the Smith-Powers Logging Company purchase, and said Company did purchase, tidelands and adjacent high lands, of the value of $12,615.50, and that said expenditure was necessary in order to erect and maintain said boom.

The answer further alleged that the old boom had

been necessarily removed by the Smith-Powers Logging Company in improving said property and in erecting proper and legal booms thereon, and that no portion of the former booms, or the materials or piling constituting the same, remained in use or standing upon said property except a few piles not worth more than $300.00.

The answer further alleged that under the statutes of Oregon, all contracts or agreements relating to land except as therein stated are required to be reduced to writing, and signed by the party or parties to be bound thereby, and that there has never been any such agreement or writing between the plaintiffs or the plaintiffs' grantors and said E. B. Dean & Co., or Dean Lumber Company, or any of these defendants, and alleges that any such partnership agreement or any transfers purporting to convey any interest in said tidelands or boom erected thereon was void.

The answer further set forth that none of said instruments of conveyance between the plaintiffs and their grantors have been recorded. That the said C. A. Smith purchased said real property without knowledge, notice or intimation of any rights, claims, interest or equities of the plaintiffs, or either of them, either as co-partners with said Dean Lumber Company, E. B. Dean & Co., or otherwise. That the public records show Dean Lumber Company to be the absolute owners in fee simple of said property and said Smith purchased the same for a valuable

consideration, and that a proper conveyance thereof was duly executed by Dean Lumber Company to said Smith, and was forthwith and regularly recorded, and that said Smith was in all respects an innocent purchaser of said property, and said Smith-Powers Logging Company in like manner purchased and paid for said lands, tidelands, boom and property from said C. A. Smith, and went into possession thereof without any notice, knowledge or intimation whatever on the part of the plaintiffs that they or either of them owned or claimed any right, title or interest in and to said lands or the boom erected thereon, and that said Smith-Powers Logging Company was an innocent purchaser thereof for value; and further alleges that plaintiffs by their neglect to set up any claims to said property, or to inform the defendants of their alleged rights in it, are estopped from now setting up any such claims.

SPECIFICATION OF ERRORS

1.

The court erred in finding that it was unnecessary to decide the character and nature of the interest of the plaintiffs in said booms.

2

The Court erred in allowing any evidence or considering complainant's Exhibits 1, 2. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 30 and each of them.

3.

The Court erred in finding that the plaintiffs E. W. Bernitt, William Klahn, George Wulff and David Young entered into an oral partnership with E. B. Dean, David Willcox, and C. H. Merchant, partners doing business as E. B. Dean and Company, in the year 1882, or at all.

4.

The Court erred in finding that the plaintiffs E. W. Bernitt, William Klahn, George Wulff, and David Young entered into a joint agreement with E. B. Dean, David Willcox and C. H. Merchant, partners doing business as E. B. Dean and Company, in 1882, or at all.

5.

The Court erred in finding that the plaintiffs E. W. Bernitt, William Klahn, George Wulff and David Young entered into an agreement with E. B. Dean, David Willcox and C. H. Merchant, partners doing business as E. B. Dean and Company, for the construction and operation of them jointly of certain log booms and dolphins, for the catching and storing of saw logs, piles and other timber.

6.

The Court erred in finding that such agreement was for the construction and operation of log booms upon land at the time thereof owned or controlled or thereafter to be acquired by the firm of E. B. Dean and Company.

7.

The court erred in finding that there was an agreement between E. W. Bernitt, William Klahn, George Wulff, and David Young and the firm of E. B. Dean and Company whereby the former were to make up the rafts and transport the same to various points on Coos Bay.

8.

The Court erred in finding that there was an agreement between E. W. Bernitt, William Klahn, George Wulff and David Young whereby a boomage charge of twenty-five cents per thousand feet, board measure, was to be made for catching logs in the Coos River booms, and one-eighth of one per cent per lineal foot for piling caught therein, of which E. B. Dean and Company were to receive one-half and said other parties one-eighth each.

9

The Court erred in holding that all parties were to contribute to the cost and maintenance of said boom in like proportion.

10.

The Court erred in finding that in addition to the boomage, Bernitt, Klahn, Wulff and Young were to be allowed to make a charge of thirty-five cents per thousand feet for saw logs, and one-half of one per cent per foot for piling for making it up into rafts and transporting the same and the said E. B. Dean and Company was to receive no part thereof.

11.

The Court erred in finding that the said log booms and the dolphins were constructed in accordance with and pursuant to such agreement.

12.

The Court erred in finding that E. B. Dean and Company contributed one-half for the cost of constructing the said log boom and dolphins and said parties contributed the other half.

13.

The Court erred in finding that from the time said booms were constructed the parties and their successors in interest continued to operate the same under the terms of such agreement found by the Court, until defendant Smith-Powers Logging Company took exclusive possession and control thereof.

14.

The Court erred in finding that the defendant Smith-Powers Logging Company took exclusive possession and control of said booms in June, 1909.

15.

The Court erred in finding that plaintiffs E. W. Bernitt, Victor Wittick have duly succeeded through mesne and intermediate transfers to the original interest of William Klahn, E. W. Bernitt, George Wulff, and David Young in said booms.

16.

The Court erred in finding that the plaintiffs are the present owners of equal shares of said interest

in said booms.

17.

The Court erred in finding that the plaintiffs were the owners of such shares during the years 1907, 1908 and 1909.

18.

The Court erred in finding that the defendants C. A. Smith Lumber and Manufacturing Company and Smith-Powers Logging Company assumed and exercised the rights of ownership of said E. B. Dean and Company in said interest in said boom, and said tide lands from and after February, 1907, in conjunction with the plaintiffs.

19.

The Court erred in finding that C. A. Smith is the controlling stockholder in the defendant C. A. Smith Lumber and Manufacturing Company.

20.

The Court erred in finding that the defendant C. A. Smith Lumber and Manufacturing Company had dominated and dominates the defendant Smith-Powers Logging Company.

21.

The Court erred in finding that all the persons and corporations succeeding to and owning the interest of E. B. Dean and Company in said booms, including the defendants C. A. Smith, C. A. Smith Lumber and Manufacturing Company, and Smith-Powers Logging Company have recognized and act-

ed under said agreements so found to exist by the Court.

22.

The Court erred in finding that all the persons and corporations succeeding to and owning the interest of said E. B. Dean and Company in said boom, including defendant C. A. Smith, C. A. Smith Lumber and Manufacturing Company, and Smith-Powers Logging Company have dealt with the plaintiff E. W. Bernitt and his copartner thereto according to and under the terms of said agreement so found by the Court to have been made.

23.

The Court erred in finding that the defendants C. A. Smith Lumber and Manufacturing Company and Smith-Powers Logging Company have expressly recognized the rights and privileges of the plaintiffs.

24.

The Court erred in finding that the defendant C. A. Smith Lumber and Manufacturing Company and Smith-Powers Logging Company consented to the use and operation of said booms by the plaintiffs during the logging season of 1907 and 1908 conformably to said original agreement.

25.

The Court erred in finding that the defendant C. A. Smith Lumber and Manufacturing Company and Smith-Powers Logging Company permitted the use

and operation of said booms by the plaintiffs during the rafting and logging operations of 1908 and 1909.

26.

The Court erred in finding that said defendants ousted the plaintiffs in the use and occupation of said booms in June, 1909.

27.

The Court erred in finding that at the time of the ouster of the plaintiffs said booms were of the reasonable value of Two Thousand Dollars.

28.

The Court erred in finding that One Thousand Dollars is a reasonable value of the plaintiffs' interest in said booms.

29.

The Court erred in finding that the interests of the plaintiffs in said booms was irrevocable.

30.

The Court erred in finding that the defendant C. A. Smith Lumber and Manufacturing Company and Smith-Powers Logging Company rendered themselves liable to pay plaintiffs for the reasonable value of their interest in said booms.

31.

The Court erred in finding that the plaintiffs were entitled to an accounting for boomage charges on logs and other timber caught and stored in said booms, and for further charges for logs and other

timber by them and transported or transferred to the mills of the C. A. Smith Lumber and Manufacturing Company and the Simpson Lumber Company during the logging and rafting season of 1908 and 1909.

32.

The Court erred in finding that during the logging season of 1908 and 1909 the plaintiffs caught and stored in said boom for said Simpson Lumber Company 4,045,273 feet of logs.

33.

The Court erred in finding that during the season of 1908 and 1909, the plaintiffs rafted and transported to the mill of the Simpson Lumber Company, 2,966,771 feet of logs.

34.

The Court erred in finding that the plaintiffs are entitled to one half of the boomage charges, viz., twelve and one-half cents per thousand feet upon 4,045,273 feet of logs.

35.

The Court erred in finding the plaintiffs entitled to a rafting charge of thirty-five cents per thousand feet upon 2,966,771 feet of logs transported to the mill of the Simpson Lumber Company.

36.

The Court erred in finding the plaintiffs entitled to $18.93 for piles boomed and rafted.

37.

The Court erred in finding the plaintiffs entitled to $1562.96 for logs and piles boomed and rafted for the Simpson Lumber Company.

38.

The Court erred in finding that the plaintiffs during the logging season of 1908 and 1909 caught in said booms 1,924,460 feet of logs for the defendant C. A. Smith Lumber and Manufacturing Company.

39.

The Court erred in finding that the plaintiffs rafted and transported 1,924,460 feet of logs to the mill of the defendant C. A. Smith Lumber and Manufacturing Company.

40.

The Court erred in finding that the plaintiffs were entitled to one-half of the boomage charge, viz., twelve and one-half cents per thousand feet upon said 1,924,460 feet of logs.

41.

The Court erred in finding that plaintiffs were entitled to rafting charges of thirty-five cents per thousand feet on said 1,924,460 feet of logs.

42.

The Court erred in finding that plaintiffs were entitled to $10.75 for booming and rafting piling.

43.

The Court erred in finding plaintiffs entitled to $924.58 from the defendant C. A. Smith Lumber and

Manufacturing Company.

44.

The Court erred in finding that plaintiffs were entitled to one-half the boomage charge, viz., twelve and one-half cents per thousand feet on four thousand logs averaging nine hundred fifty feet to the log.

45.

The Court erred in finding that any such logs passed through said boom during said logging and rafting season of 1908 and 1909.

46.

The Court erred in finding that said sum of $475.00 has been collected and retained by the defendant C. A. Smith Lumber and Manufacturing Company, and the Smith-Powers Company.

47.

The Court erred in finding the plaintiffs entitled to recover from the Smith-Powers Logging Company and the C. A. Smith Lumber and Manufacturing Company the sum of $3667.34.

48.

The Court erred in entering a decree herein in favor of the plaintiffs and against the defendants.

49.

The Court erred in ordering and entering judgement herein for costs in favor of the plaintiffs and against the defendants.

50.

The Court erred in entering judgment herein in favor of the plaintiffs and against the defendants in the sum of $3,667.34.

51.

The Court erred in entering any decree whatever upon the findings in this suit.

52.

The Court erred in not entering a decree herein in favor of the defendant C. A. Smith Lumber and Manufacturing Company, and Smith-Powers Logging Company, and against the plaintiffs upon the findings herein.

53.

The Court erred in not entering a decree and judgment in favor of the defendants and against the plaintiffs for the costs of this suit.

54.

The Court erred in not dismissing this cause as one not cognizable in equity.

55.

The Court erred in not finding herein that the complainants E. W. Bernitt and Victor Wittick have been notified that the defendant Smith-Powers Logging Company took exclusive possession of said boom in question in December, 1908.

56.

The Court erred in not finding herein that after December 20, 1908, the plaintiffs and each of them

were ousted of possession of said boom.

57.

The Court erred in not finding that on December 20, 1908, defendant Smith-Powers Logging Company took exclusive possession of said boom, and thereafter continuously maintained possession and control thereof.

58.

The Court erred in not finding that the plaintiffs, and each of them had no claim or claims whatsoever, for boomage or participation in the boomage from said boom based upon logs or piling caught or handled therein during the logging season of 1908 and 1909.

59.

The Court erred in not finding that a complete change in said booms was rendered necessary by the requirements of the engineers of the War Department in the summer of 1908.

60.

The Court erred in not finding that in order to legally maintain said booms during and after the summer of 1908, it was necessary to expend a greater sum of money thereon in conforming the same to the requirements of the government engineers.

61.

The Court erred in not finding that it was necessary in order that said booms catch, hold, handle and accommodate the logs naturally coming into the

same during the logging season of 1908 and 1909 and the subsequent logging seasons that said booms be rebuilt and enlarged and extended.

62.

The Court erred in not finding that it was necessary in order to properly maintain and continue said booms that the owners thereof purchase the lands known as the McIntosh Land, and expend therefor the sum of Two Thousand Dollars.

63

The Court erred in failing to find that it was necessary in order to legally maintain and continue said booms, to purchase the land known as the Devers tide lands, and to expend therefor the sum of $2250.00.

64.

The Court erred in failing to find that it was necessary in order to continue and maintain said booms to purchase the land known as Holland Island, and to expend therefor the sum of $2010.50.

65.

The Court erred in failing to find that it was necessary in order to continue said booms to purchase other tidelands, adjacent thereto and to expend therefor the sum of $1200.00.

66.

The Court erred in failing to find that it was necessary in order to properly maintain said boom and accommodate and hold the logs coming into the

same to purchase the tidelands upon which the extension or pocket boom at the end of said lower boom was built and that it was necessary to expend therefor and there was expended by the defendant Smith-Powers Logging Company therefor $7,155.00.

67.

The Court erred in failing to find that there was expended by the defendant Smith-Powers Logging Company, in maintaining, repairing, and conducting said boom, during the logging season of 1907 and 1908, the sum of $1350.47.

68.

The Court erred in failing to find that there was necessarily and properly expended by the Smith-Powers Logging Company in maintaining, repairing and conducting said boom in the year 1909 the sum of $2,247.23.

69.

The Court erred in failing to find that there was the necessary expenses of maintaining and repairing, and conducting said booms expended by the Smith-Powers Logging Company for the years 1907, 1908 and 1909, were and are properly chargeable against said booms.

70.

The Court erred in failing to find that the defendant Smith-Powers Logging Company should be credited as against the complainants with all sums necessarily expended by them in the maintenance and repair of said booms, during any time that the

complainants had or were entitled to any interest therein.

71.

The Court erred in failing to find that the sum of $2010.00 expended by the defendant Smith-Powers Logging Company in settling the claim for the fishing rights at and opposite the Creamery Boom was a necessary expense of maintaining and conducting said boom.

72.

The Court erred in failing to find that the agreements between the complainants and E. B. Dean constituted a mere working agreement or working interest of the complainants in said booms.

73.

The Court erred in failing to find that the interests of the complainants in said booms were terminable at any time, to the said E. B. Dean and Company by the sale or transfer of said booms.

POINTS AND AUTHORITIES

Point I.

THE STATUTE OF FRAUDS AND THE RECORDING ACT APPLY TO A BOOM AND THE TIDE LANDS ON WHICH IT IS CONSTRUCTED AS FULLY AND TO THE SAME EXTENT AS TO ANY OTHER REAL PROPERTY.

The rule being universal, no citation of authorities is necessary to support the proposition that

wharves, piers, and booms and such similar permanent improvements erected on land are real property, and this proposition seems thus far to have been conceded by all parties to the present suit. It is conceded that the tide lands on which this boom was constructed belonged to E. B. Dean and Co. at the time appellee's predecessors claim to have acquired an interest therein. How and in what manner did the partnership of E. B. Dean and Co. convey to Bernitt, Klahn, Wulff and Young their alleged interest in this real property? Certainly not by any conveyance in writing as required by the Oregon Statute, for plaintiffs' only contention has been that such interest was acquired by an alleged co-partnership agreement between the co-partnership of E. B. Dean and Co. and Bernitt, Klahn, Wulff and Young.

The Oregon Statute referred to is Section 808 of Lord's Oregon Laws, which, so far as applicable hereto, is as follows:

> "In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law:
>
> "1. An agreement that by its terms is not to

be performed within a year from the making thereof.

* * * * * * * * * * *

"6. An agreement for the leasing for a longer period than one year, *or for the sale of real property, or of any interest therein.*"

The alleged agreement was clearly void because it came within subdivision 1 above quoted. Bernitt testified at page 142 that the agreement was "that we were to do the rafting *for all time.*" It was then an agreement which by its terms was not to be performed within a year from the making thereof.

It was also void in that, by the court's finding that it operated to convey title to some part of the real property to Klahn, Bernitt, Wulff and Young, by reason of the fact that it was not in writing as required by subdivision 6 above quoted.

The bills of sale or written transfers by which Bernitt, Klahn, Wulff and Young transferred their interests to others clearly could not operate to deprive E. B. Dean & Co., or its successors of title to any part of its real estate. It is nowhere contended that there was ever any written conveyance from E. B. Dean & Co. The unrecorded bills of sale were merely the instruments by which appellees' predeecssors transferred their respective logging and rafting apparatus, boats and appliances, and such interest as they claimed or alleged themselves to have in the real property in question.

Plaintiffs did not contend nor has there ever been

any claim made by them that any conveyance of any kind transferring title from E. B. Dean and Company to them or to any of their predecessors, has ever been recorded, as required by Section 7129 of Lord's Oregon Laws, which reads as follows:

> "Every conveyance of real property within this state wherever made, which shall not be recorded as provided in this title within five days thereafter, shall be void against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded."

It is undisputed that E. B. Dean and Co. duly transferred all of its property to the Dean Lumber Company and that the Dean Lumber Company duly transferred the property in question to C. A. Smith, A. J. Sherwood, of Coquille City, Oregon, acting as attorney for Mr. C. A. Smith, at or about the time of the purchase of the properties of the Dean Lumber Company by Mr. Smith, examined the title of the Dean Lumber Company and found nothing of record as against the boom property here in question, or the lands adjacent thereto, and standing in the name of the Dean Lumber Company, and he so reported to Mr. Smith. (T. p. 436.)

There is no conflict in the evidence on these matters and we respectfully urge that any such agreement as is relied on by appellees is wholly void because not to be performed within one year, and, in so far as it purports to deprive E. B. Dean & Co., or

its successors of title to the boom or the land on which it is situated, is void because not in writing and recorded as required by the Oregon statutes.

POINT II.

THE TESTIMONY WHOLLY FAILS TO SHOW ANY CO-PARTNERSHIP AGREEMENT BETWEEN THE PARTNERSHIP OF E. B. DEAN AND COMPANY ON THE ONE HAND AND APPELLEES' ALLEGED PREDECESSORS, BERNITT, KLAHN, WULFF AND YOUNG ON THE OTHER.

Although in the opinion of the Court below, (T. p. 77), the Court says that, ((T. p. 80), it is wholly unnecessary to determine the nature of the interest that plaintiffs possessed in the booms, the decree declares there was an oral partnership, or a joint venture agreement between the partnership of E. B. Dean and Company and Bernitt, Klahn, Wulff and Young, (T. p. 87).

We respectfully submit that this is not such a case as can be disposed of by the bare assertion that it is not necessary to determine what interest the appellees have in this controversy. Our contention is and has been, and we think the proofs clearly show that Bernitt, Klahn, Wulff and Young, had merely such an agreement as is alleged in defendant's answer, (T. p. 51), viz., that E. B. Dean and Company was to permit them to use the boom for the catching, and storing of logs belonging to various persons about Coos Bay, and to raft away the logs and piling so

caught in said boom and for said privilege and said use of said booms, the said E. B. Dean and Company were to receive one-half of the boomage charges. In this connection, it becomes necessary to call the Court's attention somewhat at length to the testimony on this point.

Bernitt and Wulff were the only ones of the original parties to this alleged partnership agreement who testified and it is manifest that, the alleged agreement being oral, testimony from any other source would be but hearsay. Clearly there is nothing in the testimony of either Wulff or Bernitt to sustain a finding of a partnership agreement, of of a conveyance of any kind to them by E. B. Dean and Co., of any part of the property in question. Wulff testified that:

> "The agreement was the raftsmen were to get the rafts out and do all the rafting for twenty-five cents per thousand, and for catching logs in the boom, another twenty-five cents; that of the last twenty-five cents, the Mill company took one-half and the raftsmen one-half." (T. p. 135-136).

> "That personally he didn't have anything to do with making the original bargain with E. B. Dean and Co., and never talked with any of the members of the firm about it; that he never made any agreement or transfer in writing with Dean and Company, and did not remember getting or giving any bill of sales from Young or to

Haglund and Mattson; that he bought out Young for twelve hundred dollars, including all the rafting gear, boats, etc., and bought and sold without personally getting Dean and Company's consent." (T. p. 136.)

"That they did not consider the investment in the boom apart from the rafting gear; that the rafting gear was only worth twelve hundred dollars and in fixing the price at twenty-four hundred dollars, they figured the whole thing together, and *that nothing was ever said by him about being partners therein,* but something was said between Young and E. B. Dean and Company, the particulars of which he did not know." (T. p. 137).

"And when Klahn and Bernitt bought in, there was no separate agreement entered into, and no written agreement was ever made." (T. p. 137).

So much for the testimony of Wulff, one of the original partners to the alleged partnership agreement. It seems obvious from this testimony there was nothing more than a mere working arrangement by the owners of the boom and the land on which it was constructed, (E. B. Dean and Co.), and the two sets of rafting partners, Klahn & Bernitt, and Wulff & Young, that the latter were to be permitted to use the boom under certain terms and conditions.

Bernitt testified that E. B. Dean and Company and Wulff and Young started and built the boom and

the upper boom was nearly completed when C. H. Merchant asked Klahn and Bernitt if they would "go in with them." (T. p. 138).

> "That they might have talked with Wulff and Young, but nothing particular, but they seemed to be willing to allow the deal." (T. p. 139).

Where is the original partnership agreement? What was its terms? Where and on what basis was there a meeting of the minds, when Bernitt and Klahn talked "nothing particular" with Wulff and Young?

Bernitt then purchased Klahn's interest by "bill of sale," (T. p. 139), which described the property transferred as an undivided half interest in the "personal property" owned by the "firm of Klahn & Bernitt", and "any and all interest of whatsoever nature which the said W. Klahn has in and to certain booms" and "any and all interest which the said W. Klahn has in and to the lands on which the same is situated, together with the right to apply to the proper parties for a deed." Clearly there is nothing in this instrument which would operate to deprive the E. B. Dean and Company of title to any part of its land or the boom constructed thereon, any more than a bill of sale purporting to convey to Bernitt the Brooklyn Bridge, together with the right to apply to the proper parties for a deed, could have given him title thereto.

It is obvious from this document that there was no partnership agreement then existing between E. B.

Dean and Company, on one side and Bernitt, Klahn Wulff and Young on the other. On the contrary, there was one partnership of E. B. Dean and Company, another partnership of Wulff and Young, and still another, called in the bill of sale, "the firm of Klahn & Bernitt."

It is also obvious that E. B. Dean and Company did not convey to any of the four, any interest in the real property. That E. B. Dean and Company, and its successor, the Dean Lumber Company, did not convey, or intend to convey any interest in the real property in question, viz., the boom and the land on which it was constructed further appears at many other places in the record, notably at Page 183, where Hillstrom testified that when he purchased his interest from Kruger, he and Kruger went to an attorney's office, (J. W. Bennett), and Mr. Bennett asked Kruger if he had explained to Hillstrom that the Dean Company would not give any deed, and Kruger answered, "Yes, I explained that", and at page 289 of the record, Kruger testified that the attorney (J. W. Bennett) made the remark when he made out the bill of sale, "You fellows are buying and selling and you don't know what you are buying and you boys got nothing to show for it"; and at page 184, Hillstrom testified that "he didn't explain to Anderson Emmet at the time he bought, that Dean and Company would not give a deed or paper of any kind to the property, because Emmet was the man witness was working for and knew more about it than witness did."

As will be seen from all the testimony, this remark of Mr. Bennett's aptly describes the various dealings between the different sets of raftsmen. They were buying and selling, but didn't know what. Like Topsy, the alleged partnership agreement and alleged interest in the real property "just grew."

Kruger also testified, (T. p. 289), that when he purchased his interest from Mattson, he (Matson), didn't claim he was selling any "interest in any partnership with Merchant or with the Dean Lumber Company." That there was only a working interest such as is alleged in the answer and that there was at that time two separate partnerships among the raftsmen, as indicated by the "Klahn & Bernitt" transaction is further shown by Kruger's testimony (T. p. 291), where he says he was in partnership with Alfred Haglund, and that Bernitt had his own gear in which Kruger and Haglund had no interest. Getting back to Bernitt's testimony, we find that he testified concerning the ownership of the land as follows:

> "Q. Did he say who was to hold the title to the land, pay the taxes and the cost and expense of maintaining the boom?"

After first giving an answer not responsive to the question, the question was repeated and he gave the following answer:

> "A. The land there was nothing more said about."

This is absolutely all the testimony in the record

by any of the parties to the alleged original agreement. Of course the record is replete with proof that the raftsmen operated the boom under some sort of an agreement under which they received a certain amount for boomage and a certain amount for rafting, and that half of the boomage charge went to Dean and Company, and its successors, but the inferences to be drawn therefrom tend more strongly to prove defendant's claim of a mere operating agreement than plaintiff's claim of a partnership agreement and partnership ownership of the property itself.

The burden of proving the alleged partnership agreement and partnership ownership was upon plaintiffs and we most earnestly insist that no court can fairly say from this record that plaintiffs have sustained that burden.

The complaint alleges a partnership agreement between a partnership and four individuals. (Par. IV of Complaint, T. p. 3). Manifestly if there was any co-partnership at all, the individual members of E. B. Dean & Co., were the co-partners of Bernitt, Wulff, Klahn and Young. The complaint alleges that the firm of E. B. Dean & Co., was dissolved in 1897 by the death of David Willcox (Complaint Par. VII, T. p. 6), and this is admitted by the answer, (Par. VIII, T. p. 54). By the same event, the death of Willcox, the firm of Dean, Willcox, Merchant, Bernitt, Klahn, Wulff and Young was likewise dissolved. A sale by one partner of his interest without

the consent of the other partners dissolves the partnership.

30 Cyc. 653, citing many cases, including Meysenberg vs. Littlefield, 135 Fed. 184.

Klahn, Wulff, Young and all their successors sold and resold their interests in the so-called partnership without the consent and without even consulting the others. Any one of these sales was in and of itself sufficient to dissolve the so-called partnership agreement.

POINT III.

EVEN IF THERE WAS SUCH A CO-PARTNERSHIP AS IS ALLEGED IN THE COMPLAINT AND FOUND BY THE DECREE, THE SALE O F THE PROPERTY TO C. A. SMITH, A BONA FIDE PURCHASER, PASSED ALL THE TITLE OF ALL THE PARTNERS.

The plaintiffs' case as shown by the complaint was based on the co-partnership agreement between E. B. Dean and Company, a co-partnership, and Bernitt, Klahn, Wulff and Young, and the Court's decree is in part as follows:

> "That about the year 1882, the plaintiffs, E. W. Bernitt, Wm. Klahn, George Wulff and David Young entered into an oral partnership or a joint venture agreement with E. B. Dean, David Willcox and C. H. Merchant, partners doing business as E. B. Dean and Company." (T. p. 87.)

The record clearly shows and it is conceded by all parties that the title to all the lands in question was in the name of E. B. Dean and Company, and by them transferred to its successor, the Dean Lumber Company. This transfer from E. B. Dean and Company to the Dean Lumber Company was with the consent and approval of all the raftsmen for many of them testified concerning it and there is nothing in the record to show that they objected in any manner. On the contrary, their consent and ratification is clearly shown throughout the record.

In such circumstances the rule is clear that the sale is binding upon all of the parties Concerning this, Cyc. lays down the rule as follows:

> " If, however, the conveyance by one partner was made in the presence or with the consent of his co-partners, or has been ratified by them, it will be binding upon all."
>
> 30 Cyc 494.

In support of this text, the following cases are cited:

Arkansas.—Ferguson vs. Hanauer, 56 Ark. 179; 19 S. W. 749.

Lee vs. Onstott, 1 Ark. 206.

Deleware.—Little vs. Hazzard, 5 Harr. 291.

Iowa.—Haynes vs. Seachrest, 13 Iowa 455.

Louisiana.—Wild vs. Peters, 1 La. Ann. 432.

Mississippi.—Shirley vs. Ferne, 33 Miss. 653; 65 Am. Dec. 375.

New York.—Lawrence vs. Taylor, 5 Hill 107.

Texas.—Frost vs. Wolf, 77 Tex. 455; 14 S. W. 440; 19 Am. St. Rep. 761.

Baldwin vs. Richardson, 33 Tex. 16.

Realty Co. vs. Pounds, 128 App. Div. 91; 112 N. Y. Supp. 433.

Guevara vs. De Ocampo, 7 Phillipine 104.

If the plaintiffs ever had any interest in or valid claim to any of the real property of E. B Dean and Co., they never claimed same or demanded any deed. On the contrary, they knew, as we have pointed out, that the Dean Company would not give any deed. They permitted, consented to and ratified the sale by E. B. Dean and Company to the Dean Lumber Company, and can not now question that such sale operated to transfer to the Dean Lumber Company all right, title and interest of all the alleged partners. Furthermore, they allowed the legal title to stand in the name of the Dean Lumber Company. That Company, in turn, conveyed to C. A. Smith.

Cyc. lays down the further rule:

"If firm real estate stands in the name of one of the partners, he may make a valid conveyance thereof; And a bona fide purchaser from him will hold *free from the equities of his co-partners.*"

30 Cyc. 494.

Citing:

Robinson Bank vs. Miller, 153 Ill. 244; 38 N. E. 1078; 46 Am. St. Rep. 883; 27 L. R. A. 449.

Clarke vs Allen, 34 Iowa 190.
Rivarde vs. Rousseau, 7 La. Ann. 3.
Tillinghost vs. Champlin, 4 R. I. 173; 67 Am. Dec. 510.

The same rule is laid down in Am. & Eng. Enc. of Law, second edition, as follows:

"It has been held that where a member of a partnership holds the legal titles to a partnership property, one who purchases such property from him, bona fide for value and without notice, will take the title thereto, discharged from any trust in favor of the firm or its creditors."

Am. & Eng. Enc. of Law, Second Edition, Volume 22, page 95, citing:
McNeil vs. First Cong. Soc. 66 Cal. 105.
Robinson Bank vs. Miller, 153 Ill. 244; 46 Am. St. Rep. 883.
McMillan vs. Hadley, 78 Ind. 590.
Hiscock vs. Phelps, 49 N. Y. 97.
Page vs. Thomas, 43 Ohio St. 38; 54 Am. Rep. 788.
Dupuy vs. Leavenworth, 17 Cal. 262.
Buck vs. Winn, 11 B. Mon. (Ky.) 320.
Davis vs. Davis 60 Miss. 615.
Hogle vs. Low, 12 Nev. 286.
Lauffer vs. Cavett, 87 Pa. St. 479.
McCoy vs. McCoy 202 Pa. St. 497.

In the case of Robinson Bank vs. Miller, which is cited in support of the text both of Cyc. and of Am. & Eng. Cyc. of Law, the court said; at page 1082:

"But, even if the interest held by John S. Emmons was firm property, there is nothing to show that the holders of the mortgage thereon had notice, or reasonable ground for believing that it was firm property. The record title was in John S. Emmons, and all the circumstances coming to their knowledge, as heretofore stated, were calculated to create the impression that his real interest was that indicated by the record. Facts showing a partnership in the milling and grain business were not necessarily notice of a partnership in the land. *Now, it is well settled that a bona fide purchaser or mortgagee of firm property, from one of the purchasers holding the legal title, without notice of its partnership character, will hold it free from partnership claims.* T. T. Pars. Partn. (4 ed.) Sections 277, 278; 1 Bates Partn. Sec. 291; Dyer vs. Clark, 5 Metc. (Mass.) 562; Colly Partn. (Perk. ed) Section 135."

"A *bona fide* purchaser for value of the real property of a partnership, the legal title to which is vested in the co-partners, or in some one of them for the firm, without notice of the equitable rights of others in it as a part of the co-partnership funds, will, on the ground of his own equities as such purchaser, be protected in his title *in equity as well as at law.*"

Tillinghast v. Champlin, 4 R. I. 173, 67 Am Dec. 510.

> "A *bona fide* purchaser, for a valuable consideration, without notice of the partnership character of the property, will take the title in such cases, freed from the *equitable* claims of others, upon grounds of the highest policy."
>
> Dupuy v. Leavenworth, 17 Cal. 262, at 268.

There is no suggestion in the record that C. A. Smith was not a *bona fide* purchaser for a valuable consideration or that he did not pay full value to the Dean Lumber Company. Nor is there any suggestion in the record that the Dean Lumber Co. did not account to its alleged partners, Bernitt and Wittick for their share of the purchase price received from Smith. But even if their alleged co-partner, Dean Lumber Co., had acted in bad faith and in fraud of their rights, their remedy would be against their alleged co-partners and not against Smith or his successors.

> "A purchase of partnership property from a member of a firm in good faith, will be protected, though such partner acted in bad faith, and will not make other partners a tenant in common with the purchaser. The remedy of the defrauded partner is by action against his co-partner."
>
> Crites vs. Muller, (Cal.) 4 Pac. 567.

Bernitt knew the Dean Lumber Co. had bought out E. B. Dean & Co. (T. pp. 165, 166). C. F. Dillman, the president of the Dean Lumber Co. was introduced to Bernitt by Mr. Merchant as "the new boss of

the Dean Co." (T. p. 464). C. H. Merchant, one of the original partners in E. B. Dean & Co., and the alleged co-partner of the plaintiff) showed Mr. Dillman over the property, which he was holding as receiver, including the boom and told him it was part of the property that *had belonged* to E. B. Dean & Co. and gave Dillman to understand he had title to it as receiver. (T. p. 465). Bernitt & Wittick permitted the sale to Dean Lumber Co., knew of it, did not object, did not make any claims of ownership, must be presumed to have had knowledge of the receivership proceedings and of their alleged co-partner's (C. H. Merchant) dealings as receiver.

The first Dillman ever heard of any claim by plaintiff was after the property was sold to Mr. Smith; absolute ownership was claimed by the Dean Lumber Co. and no one else asserted any title to it so far as he knew. The books of Dean Lumber Co. did not show that Bernitt & Wittick had any claim or ownership of the property and nothing was ever done by the directors to give them any interest. (T. p. 465.)

Nor, to the best of his knowledge, was any outstanding claim called to the attention of any officer or discussed by them. *Nothing was of record* to show any outstanding claim and nothing was ever called to his attention that caused him for a moment to question the Dean Lumber Co.'s title. (T. p. 466), and he was president of that company from 1903 to 1907 (T. p. 464).

Under these undisputed facts the sale to the Dean Lumber Co. passed all the title of all the alleged partners. Bernitt and Wittick by their conduct ratified such sale. There is absolutely nothing in the record to support the finding of the court below that C. A. Smith and Smith-Powers Logging Co. succeeded to only the *interest* of E. B. Dean & Co., in the boom and tide lands (T. p. 88.) The record is clear that the *whole title* to the property was conveyed. That the *interest* of E. B. Dean & Co. only was transferred is nowhere even suggested in the record. Therefore it was manifest error to decree that the plaintiffs recover the sum of One Thousand Dollars from defendants as the value of plaintiffs' *interest* (T. p. 90). If the plaintiffs were entitled to a share of the proceeds of the sale made by their co-partner C. H. Merchant, to the Dean Lumber Co. and did not get it, they should have looked to him for it. If they were entitled to any of the proceeds of the sale by their alleged co-partner Dean Lumber Co., to C. A. Smith, and did not get it, they should have looked to Dean Lumber Co. for it. There is, by the way, no testimony that they did not receive their alleged share. But, in any event, there can be no question as to *what* was tranferred. The whole title was conveyed and not merely the *interest* of E. B. Dean & & Co. Furthermore by their conduct, which amounts to gross laches to say the least, they are and should be estopped from claiming in any court of equity that C. A. Smith should pay twice for the same property.

POINT IV.

THE FINDING OF THE COURT BELOW THAT THE DEAN LUMBER COMPANY AND THESE DEFENDANTS RECOGNIZED PLAINTIFFS' ALLEGED RIGHTS AND ACTED UNDER THEIR ALLEGED AGREEMENT IS NOT SUSTAINED BY THE EVIDENCE.

In the decree of the court below, it is said at page 89 of the record:

> "that all the persons and corporations succeeding to and owning said interest of said E. B. Dean & Co., in said booms, including the defendants C. A. Smith, C. A. Smith Lumber & Manufacturing Company, and Smith Powers Logging Company, have recognized and acted under said agreement, and have dealt with the plaintiff E. W. Bernitt and his co-party thereto according to and under the terms thereof; that the defendants, C. A. Smith Lumber & Manufacturing Company and Smith Powers Logging Company, since acquiring said interest of said E. B. Dean & Co., in said booms and the ownership of said tidelands, have expressly recognized the rights and privileges of plaintiffs by consenting to the use and operation of said booms by plaintiff during the logging season of 1907 and 1908 under the arrangements that had previously obtained and conformably to said original agreement, and permitted the use and operation thereof by plaintiffs during the rafting

season of 1908 and 1909, but refused to recognize their right to the compensation under said original agreement, and in June, 1909, ousted the plaintiffs from the use and occupation of said booms and further participation in the operation and profits thereof." (T. pp. 89 and 90.)

With all due respect to the court below we unqualifiedly assert that no court can justly make such a finding under the evidence in this case. We will endeavor to sift out this evidence from the mass of which the record is made up. Now the first person or corporation "succeeding to and owning said interest of said E. B. Dean & Co. in said booms" was the Dean Lumber Company, a California corporation. Did that corporation recognize plaintiffs' claims of ownership or rights under the original partnership agreement? Going through the record page by page we find the first witness to mention the Dean Lumber Company is the plaintiff Bernitt at page 165, where he identifies Plaintiffs' Exhibit No. 11 which exhibit and his testimony concerning it prove nothing to the point under consideration. On page 166 he testifies that he told Mr. Squires that if he had the old books of E. B. Dean & Co., he could *prove their claims to the booms.* Who was Mr. Squires? By reference to page 275 of the record we find that Mr. Squires was bookkeeper for the Dean Lumber Company from 1903 to 1905, when he became manager of that company, and that he was manager until January, 1907, at which time the business was turn-

ed over to C. A. Smith. From Bernitt's testimony (p. 166) it appears that the conversation with Squires took place after Plaintiffs' Exhibit No. 11, page 165, was rendered, and that exhibit is dated January 14, 1906. At that time, therefore, Squires was manager of the Dean Lumber Company, and the Dean Lumber Company had had possession for three years, they having taken title through receivership proceedings in 1903 (T. p. 466). And if the Dean Lumber Company recognized plaintiffs' rights and their alleged partnership agreement, why was it necessary, three years after the Dean Co. had been in possession, for the plaintiffs to "prove their claim to the booms?" *Is not this proof, out of the mouth of the plaintiff himself, that the Dean Lumber Company did not recognize their claims?*

On the same page (166) Bernitt testifies that Mr. Merchant introduced him to Mr. Dillman in the following words: "Let me introduce you to your partner, Mr. Bernitt." Note the almost childish effort to prove partnership by the use of the word "partner." Who was Mr. Merchant, and who was Mr. Dillman? Mr. Merchant was C. H. Merchant, Bernitt's own partner according to his version, the member of the old firm of E. B. Dean & Co., the receiver of that firm, who, as such receiver, conveyed to the Dean Lumber Company in 1903. And Mr. Dillman was president of the Dean Lumber Company from 1903 to 1907 when that company conveyed to C. A. Smith. Mr. Merchant and Mr. Dillman are

thus identified, and Mr. Dillman testifies regarding this introduction at page 464 of the record. Mr. Dillman's wording of the introduction is slightly different. He says Mr. Merchant introduced them in the following words: "This is the new boss of the Dean Co." But what is more important is that C. H. Merchant had charge of the properties as receiver of E. B. Dean & Co. at the time it was taken over by the Dean Lumber Company; that he then showed Dillman over the property he was holding as receiver, including the boom, that he told Dillman it was part of the property that had belonged to E. B. Dean & Co. and gave witness to understanding that he had title to it as receiver; that to the best of Dillman's recollection Merchant told him that the property was leased to Bernitt & Wittick for five years; that they were to keep it in repair for five years at their expense *and explained that they were to pay a certain rental* according to the amount of logs they sent through, but he had forgotten the rate. (Tr. p. 464, 465).

Apparently then, even Bernitt's old partner, C. H. Merchant, did not recognize any such claims as are now asserted by plaintiffs. This is all the testimony Bernitt gave concerning this matter.

The other plaintiff, Wittick, did not give any testimony on this point, except that he said that when he and Klockars bought out Emmett Anderson—

> "they did not make any deal or agreement with the Dean Lumber Company nor ask them about

it, and never did have any written agreement with them." (Tr. p. 174).

Of course, his testimony shows that when he was there the Dean Lumber Company paid the same rates for boomage and rafting as had theretofore paid, but our point is that this clearly does not show or ever tend to show that the Dean Lumber Company recognized them as having any ownership of the property, either the tidelands or the boom constructed thereon, or recognized them as "partners" in any respect. On the contrary it tends to prove only that they were allowed to use the boom for half of the boomage charges, and did the rafting with their own rafting gear, in which rafting gear the Dean Lumber Company had no interest whatsoever.

The next witness was John Anderson Emmett and there is nothing in his testimony to show that the Dean Lumber Company ever recognized such rights as were claimed by the plaintiffs. He says:

> "That he never had any deed or writing from Merchant, and didn't see Merchant or the Dean Lumber Company or any one else when he sold to Wittick. (T. p. 181).

The next witness was C. J. Hillstrom and he says that at the time he bought from Robert Kruger, the attorney who was handling the deal for them asked Kruger if he had explained to witness

> "That the Dean Lumber Company would not give any deed to this interest in the boom, and

that Kruger answered, 'Yes, I explained that' ". (T. p. 183).

It is not clear proof that the Dean Lumber Company would not recognize plaintiff's claims? The witness further testified that when he sold to Anderson Emmett, he didn't explain to him that Dean and Company would not give a deed or paper of any kind to the property, because Emmett was the man witness was working for and knew more about it than the witness did (T. p 184).

Hillstrom sold to Emmett and Emmett sold to the present plaintiff, Wittick. Is not the plaintiff estopped by the acts of his predecessors in interest from asserting his present claims against C. A. Smith, a bona fide purchaser from the Dean Lumber Company? From the testimony of the next two witnesses, Haglund and Mattson, it appears that their connection with the business was terminated before the Dean Lumber Company took title and there is nothing in their testimony to show that the Dean Lumber Company ever recognized plaintiffs' alleged rights, nor is there anything in the testimony of the next witness, L. J. Simpson on this subject. The other witnesses for the plaintiffs were Wm. T. Merchant, son of C. H. Merchant of E. B. Dean and Company, and at one time the manager of the Dean Lumber Company, John C. Merchant, another son of C. H. Merchant, George Wulff, L. J. Simpson, J. J. Sullivan, Clarence Gould, George Noy, C. H. Worrell, John Hill and C. A. Johnson, and there is

not a word in the testimony of any of these witnesses upon the point under discussion here. We have carefully examined the testimony of all the witness produced on behalf of the plaintiffs and most emphatically assert that there is not a word of testimony tending to show that the Dean Lumber Company ever recognized the rights claimed by the plaintiffs as found in the decree of the court below. On the contrary the testimony of the plaintiffs themselves and the witnesses called in their behalf was, beyond question, that the Dean Lumber Company not only did not recognize these rights, but expressly and to the knowledge of plaintiffs and their predecessors, refused to recognize any such right.

But to clinch the matter, let us see what the defendants' witnesses had to say. Plaintiffs' witness, Wm. T. Merchant, was recalled as a witness for the defendants and testified that he had been manager for the Dean Lumber Company for four years and had charge of its entire business on the Bay, including the charge and control of the booms in question and,

> "That during that time *he did not recognize or deal with any one else as having any ownership or interest in these booms.*" That there was no question but that he would have known of it if the Dean Lumber Company had so dealt, and he did not know of its doing so; that he never understood that there was any understanding *as partners* between Bernitt and the Dean Lumber Company." (T. p. 300).

C. F. Dillman testified that he was president of the Dean Lumber Co. from 1903 to 1907; that the Dean Lumber Company took title in the receivership proceedings from C. H. Merchant, as receiver of E. B. Dean and Company, about March 1903; that the Dean Lumber Company conveyed title to the booms and tide lands in 1907; that he was introduced to Bernitt by C. H. Merchant; that nothing was said to indicate that he was a partner with Bernitt or any one else in the boom or that Bernitt claimed any interest in it; that nothing was said about the ownership of the boom, that raised any question in his mind as to the ownership thereof by the Dean Lumber Company; that C. H. Merchant showed him over the property that he was holding as receiver, and told him that it was part of the property that had belonged to E. B. Dean and Company, and gave witness to understand that he had title to it as receiver; that the property was leased to Bernitt and Wittick for five years; that they were to pay a certain rental, according to the amount of logs that they sent through; that the first he heard of any claim by the plaintiffs was after the property was sold to Mr. Smith; that absolute ownership was claimed by the Dean Lumber Company and no one else had title to it as far as the witness knew. (T. pp. 464, 465, 466.)

W. F. Squire testified that from 1903 to 1905, he was bookkeeper of Dean Lumber Company and was manager of that company from 1905 until the busi-

ness was turned over to C. A. Smith in 1907. (T. p. 275). That after he became manager, he endeavored to find out what arrangement the boom was being operated under, look up records, files and papers of the company; inquired of *Captain Bernitt* and got what information he could from other people who had been connected with the concern. (T. p. 276.)

> "That as near as witness could remember from conversations and books, the arrangement with the plaintiffs seemed to be that they had charge of the booms, collected the logs and looked after the logs, which after were caught, they attended to the repairing and had the exclusive privilege of doing the rafting from the boom; that they made their own collections and shared half the profits derived from the boomage, which was credited to them whenever the logs came to the Dean Lumber Company or which they collected themselves when the logs went to other companies. The rafting was always credited direct to them and half of the boomage was credited direct to Bernitt and Wittick under a separate account." (T. p. 277).
>
> *"That they (plaintiffs) never claimed to the witness that they owned a half interest in the boom."* (T. p. 279).

P. L. Phelan testified that he was formerly manager for E. B. Dean and Company; that at one time there was some talk of selling the property and that

he went to Mr. C. H. Merchant and asked him about the rights of the rafters in case the boom was sold and C. H. Merchant replied that,

> "The rafter never had anything but a working interest and the Dean Lumber Company have always owned the property, and when the property is sold, if the rafters want to raft, they will have to make arrangements with the other party, their interests cease when the property is sold." (T. p. 269, 270).

> "That witnesses' understanding from Mr. Merchant was that if he could not get along with the rafters he was at liberty to get somebody else to handle the booms; that witness could not find out from books kept prior to this time he went there, what the arrangement was and this was the reason why he talked with Mr. Merchant." (T. p. 273.)

> "That the books showed that E. B. Dean and Company owned the land and paid the taxes and these taxes were not charged to the boom, and didn't appear anywhere in the Coos River Boom account." (T. p. 274.)

Robert Kruger, who purchased from Mattson and sold to Hillstrom testified that:

> "Matson didn't claim he was selling any interest in any partnership with Merchant, or the Dean Lumber Company." (T. p. 289.)

This is positively all the evidence in the record to support the finding of the court below that the Dean

Lumber Company ever recognized the plaintiffs as partners or as having any interest in the property. We have gone carefully through the record and this testimony shows beyond any question that the Dean Lumber Company absolutely refused to recognize the claim which plaintiffs now make.

C. A. Smith was the next person "succeeding to and owning" the property in question, and he in turn, conveyed to Smith-Powers Logging Company. Let us next examine the record to see whether either of these parties ever recognized plaintiffs' alleged rights as owners and partners. Taking up the testimony in the order in which it appears in the record, we find that plaintiffs' witnesses, Wm. T. Merchant, John C. Merchant and George Wulff did not testify on this point. The plaintiff Bernitt testified that he had a conversation with Mr. A. H. Powers (T. p. 147). Mr. Powers was vice-president and manager of the Smith-Powers Logging Company, but was not interested as a stockholder or otherwise in the C. A. Smith Lumber and Manufacturing Company. (T. p. 342). Bernitt's counsel asked Bernitt the following question:

> "Q. Did you tell him of your claim of interest in the boom?"

Instead of giving a direct answer to this question, the witness, Bernitt, evaded it and gave the following answer:

> "A. Well, he said it himself, that Mr. Smith wanted him to take that boom and this logging

concern over, I believe, but he said he would not, as long as Wittick and I were interested in it." (T. p. 148.)

Bernitt did not have any other conversation with Mr. Powers on that subject about that time or during the year 1907. (T. p. 148).

The witness further testified that in the latter part of the summer or fall of 1908, Mr. Powers first claimed that the plaintiffs owned nothing in the boom, that at that time he had the witness and Mr. Wittick up at the company office and said that the plaintiff had nothing more to do with the boom; that Mr. Oren was there and asked the plaintiff why, if they owned an interest in the boom, they were paying rent for it. (T. p. 150).

The witness further testified that he met Mr. Mereen in the spring of 1907 on a wharf in Marshfield, at which time Mr. Mereen said that he understood that the witness and a partner in North Bend claimed a half interest in the boom, to which the witness replied that they did, whereupon Mr. Mereen said that that was no way to have it, that they had to own it all or none; that he was sure that that was prior to the rafting season of 1907 and 1908. (T. p. 150.)

C. A. Smith purchased from the Dean Lumber Company in February, 1907, (T. p. 219), and according to the plaintiff Bernitt, himself, in the testimony we have just referred to, that Powers and Mereen expressly refused to recognize the claim of ownership in 1907.

In the name of justice, how can any court find that these defendants or any of them recognized these claims when the plaintiff Bernitt himself expressly and unqualifiedly testified that they refused to do so.

Again, on page 151, Bernitt testified that in the fall of 1908 they had the first conversation with Mr. Powers about the ownership of the boom and at that time Mr. Powers said, "I tell you right here that you haven't anything more to do over there." (T. p. 152).

Can this remark of Mr. Powers' be construed as a recognition of Bernitt's rights as a partner and owner?

Bernitt again testified on page 160, that he had a conversation with Mr. Mereen on the wharf one Sunday morning in the summer of 1907, at which time Mereen told him and at which time witness told Mr. Mereen that they claimed an interest in the boom, and Mr. Mereen said that that was no way to have it, that they had to have the whole of it or none, and the witness was not sure whether or not Mr. Powers was there at that time." (T. p. 160.)

The plaintiff Wittick was the next witness called and he testified that he never had any conversation or dealing with Mr. Powers, or any one representing the Smith-Powers Company, that he did not know Mr. Powers even after he had lived here for a year; that he was in the mill office with Mr. Bernitt at the time Mr. Powers told them they had no interest in

the boom, but he didn't remember how long ago it was. (T. p. 174); that at the time Powers told the witness in the office that *he did not recognize plaintiffs as having any interest in the boom* is the only conversation witness ever had with Mr. Powers and that then he "just listened." (T. p. 176).

He further testified that he had no agreement or understanding with Mr. Powers or the Smith-Powers Logging Company. (T. p. 176).

Here again we have positive testimony by the other plaintiff Wittick that the rights claimed by the plaintiffs were not recognized.

Plaintiffs' witnesses, Emmet, Hillstrom, Haglund and Mattson testified to matters that occurred long before Mr. Smith took title from Dean Lumber Company and there is nothing in their testimony on the subject under discussion.

The next witness was L. J. Simpson, called as a witness for the plaintiffs, but afterwards made the witness of the defendants, and he testified that he had had a conversation with Mr. Bernitt and Mr. Wittick in relation to going in jointly with them and the Smith-Powers Company in the ownership and construction of a boom that Mr. Powers claimed that the Smith-Powers Company owned the boom and that Mr. Bernitt and Mr. Wittick had no interest in the business; that he considered their interest as a working interest to do rafting; that the witness knew of the claim of Bernitt and Wittick and that their claim of ownership was discussed

with Mr. Powers at that time. (T. p. 202-203.)

Plaintiffs then recalled W. T. Merchant. There is nothing in his testimony in point nor in that of the plaintiff Bernitt who was recalled.

Mr. C. A. Smith was then called as a witness for the defendants and he testified that in February, 1907, he purchased the boom in question from the Dean Lumber Company, the bargain being made in Sacramento; that all the knowledge he had of the boom was from having seen it when passing by on a launch, and the statement of Mr. Dillman that the boom had been maintained there for many years and that it was a part of the assets of the Dean Lumber Company. (T. p. 219.)

Mr. Smith further testified that at the time of the purchase, he had no knowledge, notice or information that the plaintiffs or any other than the Dean Lumber Company claimed any right or interest in these booms; that he did not remember when he first heard of the plaintiffs' claim, but first heard of it many months afterward, it may have been a year or more; that to the best of his recollection, he had some information that Bernitt and Wittick paid a rental to the Dean Lumber Company of ten cents; a shilling or fifteen cents per thousand for the use of the boom, and thinks that information came through Mr. Powers in the summer or fall of 1907. (T. p. 221.)

Mr. Smith further testified that from the time he first acquired the boom Mr. Powers had had the

practical management thereof; that from the fall of 1909, outside of his interest in the Smith-Powers Logging Company, he had no interest in the business of the boom; that at the time of purchase, he had the records and abstracts of title examined by an attorney to determine the title to all the property, and did not discover that there was any record claim against, or defect in the title to the booms. (T. p. 222.)

The next witness, Mr. Gould, did not mention this subject, nor did plaintiff Bernitt, who was next called.

The next witness was W. J. Ingram, who took charge of the boom between Christmas and New Years 1908. (T p. 233). He testified that plaintiffs, during the winter of 1908 and 1909 were rafting and towing logs and stayed at the boom part of the time; that they were not always there, but Ingram stayed there all the time, camped there at night in a little scow, and lived in while plaintiffs did not live there. (T. p. 243). From this testimony it may be gathered that the plaintiffs' rights were not recognized during the season of 1908 and 1909, as they were busy rafting and Ingram was in charge for the Smith-Powers Company. It is hardly necessary to point out that the question of plaintiffs' rights to conduct a towing and rafting business on the waters of Coos Bay is not in controversy in this suit. Certainly the fact that Mr. Ingram was in charge of the boom for the Smith-Powers Company does not indi-

cate that the plaintiffs' alleged rights of ownership were being recognized at that time.

The next witness, Alvin Smith, did not given any testimony on the question under discussion.

The next witness was Willis Varney, who testified that he was familiar with the booms in controversy, that he first saw them in 1907 when he went over them with Mr. Powers with the view of repairing them; that in 1908, he took charge of boom for the Smith-Powers Company, he thought in the month of August; that no one else was in charge of them at the time and he didn't see either of the plaintiffs at the boom or doing anything there; that he saw them going by, but that was all; that he remained in charge of the boom continuously from August until Christmas and then turned them over to Wm. Ingram. (T. p. 260.)

Here again we find that the Smith-Powers Logging Company were clearly not recognizing plaintiffs' alleged rights.

The next witness was P. L. Phelan, whose testimony covered a period prior to Mr. Smith's acquiring title.

The next witness was W. F. Squire, whose testimony covered the period of occupancy of Dean Lumber Company, and he gave no testimony as to what happened after Mr. Smith took possession, nor is there anything in the testimony of the next two witnesses, C. W. Davis and Robert Kruger.

G. A. Brown testified that he was cashier of the

Smith-Powers Logging Company and had held that position since October 1907, that in the fall of 1907 he heard Mr. Powers say he would have to send a man over to the Coos River boom and see that it was in shape to take care of the logs; that Mr. Bernitt came over and asked for a statement of the rafting, said that Mr. Wittick and himself together received thirty-five cents a thousand for everything rafted out of there and out of the Simpson logs they were to get twelve and one-half cents and the company were to get twelve and one-half cents, and for the logs going to the Smith Lumber Company, twenty-five cents was to go to maintaining the booms and if there was any balance it was to be split; that witness asked him the reason for this and Mr. Bernitt had said they had a *working interest* with the old company to that effect. (T. p. 295.)

In passing we wish to call attention to the fact that the plaintiffs nowhere attempted to contradict this testimony.

The witness further testified that the first settlement with the Smith-Powers Company was made on Mr. Bernitt's statement.

> "That Mr. Bernitt didn't claim that plaintiffs were partners with the company in owning the boom or that they owned any title in the boom or the boom property itself." (T. p. 296.)

But he understood from Bernitt that the twelve and one-half cents came from the Simpson Lumber Company to the Smith Company because the latter

owned the boom and that the plaintiffs were to get the said twelve and one-half cents for looking after the boom; that that was their share of their working interest. (T. p. 296); that it was not until 1909 that witness heard that plaintiffs claimed to own any interest in the boom and this claim was made long after the time he had claimed that they had a working interest. (T. p. 296).

There is nothing to the point in the testimony of the next witness, Codding, or W. T. Merchant, (recalled).

G. A. Brown was next recalled as a witness and testified that it was his understanding from the conversation he had with Mr. Bernitt that the latter represented that he had only a working interest in the boom; that this was at the time he made the first settlement but could not state positively the year. (T. p. 324.)

Again at page 331 of the record the same witness testified,

> "That in the conversation with Mr. Bernitt he did not claim to be a partner with the Smith-Powers Company or to be a partner with the Dean Company only as far as a working interest was concerned; that the witness did not try to ascertain at that time exactly what the claim in regard to it was, but understood him to claim a working interest only, and was based upon the conversation with Mr. Bernitt; that Mr. Bernitt's statements were such that the witness re-

ceived a very fixed impression; that all the interest that the plaintiffs have in that boom was the working interest." (T. p. 332).

Arno Mereen was next called as a witness and he testified that he resided in Berkeley, California, and was the general superintendent of the C. A. Smith Companies; that he did not remember of meeting Mr. Wittick, and the only conversation he had was on the dock in front of the old Dean and Company's store, one Sunday morning, and was the year they were building the new mill, 1907, *some time during the summer;* that as he remembered it, he and Mr. Powers had been talking in connection with some claim that Mr. Bernitt was making relative to ownership or partnership in the booms with the Dean Lumber Company, and that he still held such interest; that Mr. Powers called his attention to it and witness was called into the conversation and told Mr. Bernitt:

"That they did not know him in the deal; that the company could not recognize him in any such deal; that the company knew of no such claim in taking over the property and were not made aware that there was any such deal." (T. p. 334.)

Here, again, is positive, direct testimony that the defendants, C. A. Smith and Smith-Powers Logging Company *did not recognize* plaintiffs' claim and that they so informed plaintiffs in 1907, and this testimony is not only uncontradicted but is corroborated

by plaintiff Bernitt himself at page 150 of the record.

There is nothing in point of the testimony of the next witness, McLaren.

A. H. Powers was the next witness called and he testified that he was vice-president and general manager of the Smith-Powers Company and had been such since the organization of the company in 1907; that he first saw the property involved in this suit in February 1907; that at that time he went over the boom, as Mr. Smith had told him that he had purchased it from the Dean Company, that he met the plaintiff Bernitt in the summer of 1908 but did not meet Wittick until the fall of 1908; that in July 1907 the Smith-Powers Logging Company purchased the boom and the tide lands. (T. p. 342-343.)

Mr. Powers further testified that shortly after he bought the boom, he talked with Mr. Squire, who introduced him to Mr. Bernitt and told him about the rafting, and what he had paid Mr. Bernitt for doing the rafting and the witness looked over the boom with Mr. Bernitt and made arrangements for him to do the rafting that season just as he had always done the rafting; that he was willing for him to handle the same as he had always handled it for that season. (T. p. 345.)

Can this testimony be the basis for the decree of the court below that defendants consented to the use and operation of the boom by plaintiffs during the logging season of 1907 and 1908 under the arrange-

ment that had previously obtained and conformably to said original agreement? Is that a fair construction of the testimony of Mr. Powers, when it is apparent that he made this arrangement upon the strength of what Mr. Squire had told him in regard to the amount previously paid for rafting? Powers knew nothing of the alleged partnership agreement and knew nothing of plaintiffs' claims of ownership. The only fair construction of this testimony is that he intended to pay Bernitt the same amount for rafting that had previously been paid him and did not intend to act "conformably with the original agreement," of which agreement he had no knowledge.

Mr. Powers testified further concerning this matter at page 354 of the record, as follows:

> "Mr. Squire introduced me to Mr. Bernitt, the first time I remembered of seeing him, sometime in July 1907 and Mr. Bernitt and I went and Mr. Squire went over the boom and went around over it. Mr. Squire had told me that Mr. Bernitt always had done the rafting for the Dean Company since he had been there and he considered him a good raftsman, and he wanted to know if I would make a deal with him for doing the rafting this coming year. So we went over and looked over the booms and I told Mr. Bernitt that I would be glad for him to go ahead and handle the boom that year just as he had been handling it the year before; that we didn't

have very many logs in the river of our own and that I wasn't prepared to do the rafting at that time."

Mr. Powers further testified regarding the conversation which took place at the time Mr. Bernitt was introduced to Mr. Mereen, when Mereen told Bernitt that they didn't recognize Mr. Bernitt or any one else as having an interest in that boom, as he understood C. A. Smith bought the entire affair from the Dean Company. (T. p. 359).

Mr. Powers further testified as follows:

"Then the next time I met Mr. Bernitt about it was the first time that I ever remember seeing Mr. Wittick. Mr. Bernitt, Mr. Wittick, Mr. Goss, Mr. Oren and myself, that fall—I think sometime late in October, had a meeting over in the Company's office and we talked over this boom business and I told Mr. Bernitt at that time, the same as I had told him before, that I had bought the entire interests; that I, as the Smith-Powers Logging Company, had bought the entire interest in that boom from C. A. Smith and I couldn't think of having any partners in the business; that I was prepared to do the rafting myself and was rigging up for it;

* * * * * * * * * * *

I also told him that if at any time I wanted anybody to work, to hire anybody by the days' wages or anything like that, I would be glad to give them a job the same as anyone else, when-

ever I needed a man. That was in the presence of the gentlemen that I have just named over." (T. p. 359).

Mr. Powers further testified that he did not remember of ever having any conversation with Mr. Wittick with regard to the boom work except at that time.

Mr. Powers further testified at page 368, concerning the conversation on the wharf one Sunday morning in 1907, concerning which both Mr. Bernitt and Mr. Mereen testified, and says that Mr. Mereen told Bernitt that they did not recognize anybody in that boom, that it was bought from the Dean Company, by Mr. Smith as the other property was at Marshfield and that it was sold to the Smith-Powers Logging Company.

There is much similar testimony by Mr. Powers on pages 369 and 370, all of which is conclusive that Mr. Powers never recognized in any way the plaintiffs' claim of as partners or owners.

The next witness was Mr. George Nay, who testified entirely concerning other matters, as did C. H. Worrell, John Hill, C. J. Hillstrom, Henry Coffin and W. J. Ingram. Mr. Powers and Mr. Simpson were also recalled and so were the plaintiffs N. W. Bernitt and Victor Wittick, but none of them testified concerning the matter under consideration.

Mr. Powers was again recalled and testified as follows:

"I never had any talk with Mr. Bernitt about

them going in with me on the booms. The only talk I had with them was in regard to them doing the rafting the first year we was here, the winter of 1907 and the spring of 1908, and that was that they could go on and do the rafting the same as they had done it theretofore that year, but so far as having any talk with them in regard to them going in with me on the boom, I never had any such conversation. The conversation in regard to anybody going in with us on the boom was all done with L. J. Simpson and Captain A. M. Simpson, and the first that I had heard that Mr. Bernitt or Mr. Wittick claimed any interest in the boom, I heard it from Mr. Varney and our other men that were working on the boom, dividing the channel. This was the first intimation that I had ever had that they claimed any interest in the boom." (T. p. 457.)

The next witness was J. E. Oren, who testified that he was a resident of Bay Point, California; that he was vice president and manager of the C. A. Smith Lumber and Manufacturing Company from the time the company was organized until about the middle of September, 1909; that as such officer, he examined the booms in question in March, 1907, and saw them frequently during the time he was in Marshfield; that he then took possession of the booms and did not see either of the plaintiffs in or around the boom nor any man present upon or in possession of the boom; that the record title then

stood in the name of C. A. Smith Lumber and Manufacturing Company, but the Smith-Powers Logging Company was the actual owner and had charge of the management and operation of the booms. (T. p. 462.)

That to the best of his recollection, in the spring of 1909, a meeting was held in the office of the Smith-Powers Logging Company at which time there were present Mr. Powers, M.r Bernitt, Judge Goss and Mr. Wittick, at which time, Mr. Bernitt and Mr. Wittick requested to be recognized as part owners of the boom, which request Mr. Powers refused; that the witness never had any conversation with either of the plaintiffs as to any right or pretended rights on their part in these booms. (T. p. 463.)

Mr. Dillman's testimony has already been discussed, and his testimony is the next appearing in the record.

We have now discussed fully and fairly the testimony of every witness who testified on the subject under discussion and there is absolutely nothing on which the court below could base its finding that the Dean Lumber Company or any of these defendants ever recognized plaintiffs' alleged rights of ownership and partnership or ever acted "conformably with said original agreement," and we ask this court to examine this record in fairness and justice to these appellants and say if any such finding is justified.

POINT V.

THERE IS NOTHING IN THE RECORD JUSTIFYING THE FIXING OF JUNE 1909 IN THE DECREE AS THE DATE WHEN PLAINTIFFS WERE OUSTED OF POSSESSION.

The court says that in June 1909 defendants ousted plaintiffs from the use and occupation of said booms. (T. p. 90)., and awards damages up to that time.

This finding is clearly contrary to the evidence of the plaintiffs themselves as well as the evidence of the defendants. In witness, Bernitt testified as follows:

> Q. Now, how long did you continue to operate these booms up to, from the time you have indicated in your testimony since making the arrangement with Mr. Merchant, or E. B. Dean and Company?
>
> A. Up to when?
>
> Q. Yes.
>
> A. *Up to* 1908—*up to the spring of* 1908" (T. p. 144-145).
>
> "That the plaintiffs had charge of the boom in the year 1907 and 1908, and in the fall of 1908 they had the first conversation with Mr. Powers about the ownership of the boom; that the Smith-Powers Company caught the first logs that came down that fall; that whenever logs were turned loose above tide water, they were sent word to be over and catch them, but this

time they were not notified and the witness asked them what they meant by cutting plaintiffs out that way. Whereup Mr. Powers told the witness to bring Mr. Wittick up to the office and talk it over; that at the office the witness explained that they had built the booms and paid for them and claimed a half interest in them, and that Mr. Powers finally said, "I tell you right here that you haven't anything more to do over there," and said that they had no interest in the booms." (T. p. 151-152).

Here is positive testimony by the plaintiff Bernitt that he was ousted of possession in the fall of 1908, yet the court below fixes the date as June 1909.

We are at a loss to understand where the court below found in the testimony any reference to June 1909 unless it be at page 222, where C. A. Smith testified that since June 1909, outside of his interest in the Smith-Powers Logging Company, he had no personal interest in or possession of the boom, etc., and the further testimony at page 223, that the paper title may have passed about 1909, and he also says on the same page that the Smith-Powers Logging Company was in control of the property as owner long prior to that time.

W. J. Ingram testified that he was in charge of the boom in the winter of 1908 and 1909 and took charge of the boom between Christmas and New Years' 1908, and remained in charge until March 5, 1909. (T. p. 233).

Willis Varney testified that in August 1908 he took charge of the boom for the Smith-Powers Logging Company and that no one else was in charge of them at the time and he didn't see either of the plaintiffs at the boom or doing anything there, that he saw them going by but that was all; that he remained in charge of the boom continuously from August until Christmas and then turned them over to Wm. Ingram. (T. p. 260).

He also testified to the same effect as did Bernitt that in the fall of 1908, when the logs first came down, they were caught by the Smith-Powers Logging Company. (T. p. 266).

Bernitt also testified at page 146 of the record that the plaintiffs had possession of the boom *up to the spring of* 1908.

Mr. Powers testified that Mr. Varney was placed in charge of the booms in July 1908 and was instructed to build the booms and did build the booms under Powers' instructions. (T. p. 381.)

The record is clear and the evidence is uncontradicted that the Smith-Powers Company took exclusive possession of the booms in the summer of 1908 and that if the plaintiffs were ever ousted they were ousted then.

The complaint alleges that they were ousted in June, 1909, and the court below in its opinion, page 80, calls attention to this allegation of the complaint and says: "This allegation seems not to be contraverted by the defendants and must be taken as true."

In this connection we call attention to paragraph 9 of the answer (T. p. 54), where it is alleged that in July 1907 C. A. Smith and Smith-Powers Logging Company agreed to purchase the tide lands and boom and at that time *entered into the possession thereof and ever since have been in the open, continued and exclusive control thereof,* and to the allegation of the answer on page 58 of the record, that the plaintiffs were permitted to operate the boom until the fifteenth day of October, 1908, at which time the defendants informed the plaintiffs that thereafter the Smith-Powers Logging Company would take exclusive charge of said boom and premises.

These allegation and other allegations of the answer seem to us to clearly negative the assertion that defendants admitted ousting plaintiffs of possession of the boom in June, 1909, furthermore as we have pointed out, there is no contradiction in the testimony on this point, plaintiffs' witnesses and defendants' witnesses all agreeing that since the summer of 1908 the Smith-Powers Company was in exclusive possession of boom.

The fixing of this date is of the utmost importance for the reason that in the court's decree, the damages awarded and the amounts decreed due plaintiffs were for the logging season, that is the winter of 1908-1909.

If the date of ouster is the limit of the time for which plaintiffs are entitled to recover, then clear-

ly by the same reasoning, if the time be the summer of 1908, then the plaintiffs are not entitled to recover after that time.

POINT VI.

IF, AS FOUND BY THE COURT BELOW, THE DEFENDANTS RECOGNIZED AND ACTED "CONFORMABLY TO SAID ORIGINAL AGREEMENT," THEN THE PLAINTIFFS SHOULD CONTRIBUTE TO THE EXPENSE AND MAINTENANCE OF THE BOOM CONFORMABLY TO THAT AGREEMENT.

In its decree the court below finds (T. pp. 89 and 90) that the defendants "have recognized and acted under said agreement, and have dealt with the plaintiff Bernitt and his co-party thereto according to and under the terms thereof" and "have expressly recognized the rights and privileges of plaintiffs by consenting to the use and operation of said booms by plaintiff during the logging season of 1907 and 1908 under the arrangements that had previously obtained and conformably to said original agreement, and permitted the use and operation thereof by plaintiffs during the rafting and logging season of 1908 and 1909, but refused to recognize their right to the compensation under said original agreement."

Even if we admit, for the purpose of argument, that all this is correct, and even if a court of equity were decreeing specific performance of the contract in question, it seems manifestly unjust and inequit-

able to enforce only that part of the contract which entitles the plaintiffs to compensation and refuse to enforce that part of the contract which requires them to bear their share of the burden.

As we have seen, the Smith-Powers Logging Company, through its manager, A. H. Powers, permitted the plaintiffs to operate the boom during the logging season (winter) of 1907-1908 believing that the old arrangement was that they were to have for their work one-half of the boomage charges and their usual rate for rafting, and in ignorance of their claims of ownership and partnership. There is and can be no question of the good faith of the defendants. Their every transaction was open and above board. They have conducted themselves in such a way throughout as to merit the consideration of a court of equity The plaintiffs, during the winter season of 1907-1908, had all the privileges and emoluments they had ever had. There is no dispute as to their having collected all that was due them or that they claimed to be due them for this period.

Bernitt testified:

> "That during the winter of 1908, i. e., the boom season of 1907 and 1908, *the plaintiffs handled all the logs at the boom and collected the boomage and rafting charges the same as they had done before.*" (T. pp. 160-161.)

Again Bernitt testified:

> "That during 1907 and 1908 the plaintiffs handled the boom and the rafting and collected

as usual therefor, and that no one else was in possession except himself and Wittick." (T. p. 149.)

The plaintiffs and the Smith-Powers Logging Company had a settlement for the logging season of 1907 and 1908 and such settlement was handled on the basis of the figures that Mr. Bernitt gave to Mr. Brown, who was cashier of the Smith-Powers Logging Company at that time. T. p. 297.)

In August 1908 Willis Varney took charge of the boom for the Smith-Powers Company and from that time until Christmas 1908, he and his crew of men were engaged in repairing the booms and building additions thereto. (T. p. 260), and he turned the booms over to his successor, Ingram, who took charge of the booms between Christmas and New Years (T. p. 233).

Let us examine the testimony to ascertain the condition of the booms at that time and the necessity for repairs, changes and exension of said booms.

Bernitt says that the amount which each party had to contribute when the boom was behind must have been four or five hundred dollars every year. (T. p. 156); that every year they had to renew chains and set piling and repair and extend the boom and that every year they would have a pile driver there to repair and that there was never a year that they did not take up from 1500 pounds to a ton of chains; that the chains did not last there over five, six or seven years. (T. p. 156).

There was other testimony that the old piling along the shore was pretty well rotted at the top and decayed from water; that they were so rotted down as to impair their usefulness, as, if a pile used in a boom, is rotted below high water it is of no particular use for the boom as the logs go over it; that quite a number of these piles were rotted below high water; that they would just hit them with an axe and the top would fall over; that the chains were pretty well used up and the sticks water-logged, many of them sunken; that the upper boom was not safe to hold logs, etc., etc. (T. p. 234).

That the old booms were worth possibly four or five hundred dollars. (T. p. 236).

Alvin Smith who had lived near the boom for twenty-five years testified to the same condition. (T. p. 253 et seq.)

Willis Varney also testified to the bad condition of the boom. (T. p. 259. et seq.)

P. L Phelan, manager for E. B. Dean and Company, testified that the boom wasn't kept up, was depreciating all the time, getting a little worse, and a little worse and not only were most of the boom sticks rotting out faster than they were replaced and the chains giving out, but the boom itself was filling up rapidly on account of drift and that if something wasn't done, in a few years it would fill up and become a mud flat; that the policy was to make just what repairs they were compelled to to save the logs. (T. p. 271-272.)

Mr. Squire, manager of the Dean Lumber Company, testified that the booms were badly dilapitated and that he talked with Mr. Bernitt in regard to repairing hem and that the last year before the company sold out, he had considerable talk with Mr. Bernitt about the boom and they came to the conclusion that they would not expend any more money than was absolutely necessary to keep the booms in sufficient repair to work another season; that while he was manager, the repairs were no more extensive than were necssary to operate the booms and there were no extensions or improvements that he knew of, that he often conferred with Mr. Bernitt about the course to pursue as there was apparently a crisis coming as to whether they could use the booms at all or not, and they were being forced by other parties who were kicking that the booms occupied the channel and there seemed to be no permit from the government; that they didn't suppose thet they could obtain a permit from the Government to use the booms that way and that it was a matter of just get along as well as they could until they were compelled to do something different; that this was the talk between the witness and Mr. Bernitt. (T. p. 278.)

Robert Kruger, who was a raftsman, and formerly interested in the boom in question, and one of the alleged "partners," testified that after he sold out he was in the rafting business and rafting out of Coos River right along, and went by the boom and saw it a great deal, that some little repairing was done on

the boom once in a while; that he saw the boom in 1907-1908 when Mr. Powers took charge of it and at that time the boom wasn't in very good condition; that the Smith-Powers Logging Company drove the piles, put in new boom sticks, and made pockets. (T. p. 290-291.)

Charles H. Codding, testified that he was a civil engineer and had seen the boom and surveyed it when Mr. Powers first took charge; that while the piling was all right; there was some dolphins built that were boarded up and many and many of the boards were gone and the boom sticks were disconnected in places; the chains gone entirely; that a number of chains or toggles were in bad repair, lost and nearly all eaten out; that the boom altogether had what the witness would call an abandoned look and did not look as though it had been used for a long time. (T. p. 298).

A. H. Powers testified that when the Smith-Powers Logging Company took charge of the booms, the condition of the boom was very poor, many of the piling were rotted out; that logs could not be handled economically through such a boom as there were no rafting pockets, and it would cost a great deal more than it should to handle the logs; that many of the boom sticks were rotted, water-logged, absolutely run down and entirely out of repair; that most of the chains were in such poor condition that you could kick them out with your foot; that the sheer booms were in bad condition, had never been properly made, etc. (T. p. 343-344).

There is much similar testimony in the record of similar import which is not contradicted by plaintiffs and it can not be questioned but that the boom was practically useless when Mr. Smith purchased it and when Smith-Powers Logging Company took charge of it.

There is also a mass of testimony as to the repairs that were made by the Smith-Powers Logging Company much of which can be summed up by reference to defendants' Exhibit "C", page 305, which shows that from September 20, 1917 to January 1st, 1909, the Smith-Powers Logging Company spent $10,736.-80 in and about this boom, this January 1st, 1909 balance appears at page 307. Of this amount, $7,-155.00 was paid to the Coos River Tide Lands Company for tidelands. (T. p. 326), but passing for the moment the question of the necessity of purchasing these lands, the statement shows that the other items were chains, bolts, labor, spikes, links and staples, rings and toggles and similar articles.

Defendants' Exhibit "D", page 320 of the record also sums up briefly the amount expended in repairing this boom.

Disregarding the question of the necessity of purchasing tide lands for making changes and additions as required by the United States Government, and disregarding the question of the necessity of building additions and extensions to the boom, the testimony clearly shows that the Smith-Powers Logging Company expended large sums in the actual repair

of the old boom; that such repairs were absolutely essential to the operation of the boom. Surely it is not in equity that an innocent purchaser for value should be compelled not only to pay for the property twice, but to shoulder the whole burden of the necessary repairs and maintenance and expense of operating the boom and allow the plaintiffs who, under their own statement of the case, had slept on their rights for years, to reap the profits without sharing in the losses under their alleged co-partnership agreement, which the court below says all parties during that period recognized and acted under.

ILLEGALITY OF THE OLD BOOM AND THE ABSOUTE NECESSITY OF CHANGING IT IN ACCORDANCE WITH UNITED STATES GOVERNMENT REQUIREMENTS.

Prior to the time defendants took over the boom there had never been any governmnt permit obtained for the construction and maintenance of the boom as required by law.

The Acts of Congress referred to are 6 Am. U. S. Stat. p. 805, River & Harbor Act, Sept. 10, 1890-27 Stat. at L. 88 which prohibits the erection of booms, etc., and the creation of any obstruction not affirmatively authorized by law, to the navigable capacity of any waters in respect to which the United States has jurisdicion, and constitutes as an offense "the continuance of any such obstruction, whether heretofore or hereafter erected except bridges, piers,

docks, and wharves, and similar structures, erected for business purposes", and 26 Stat. at L. 454, Act of March 3, 1899, 30 Stat. at L. 1151, which forbids the erection of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States including "pier, dolphin, boom," etc., except on plans recommended by the Secretary of War.

There can be no prescriptive right to maintain or continue a material obstruction in a navigable stream.

30 Cyc. 310.

Such an obstruction may be removed without compensation from the United States and such removal cannot be regarded as a "taking of private property" within the meaning of the constitution.

21 Op. of Atty. General, 43.

Bernitt testified that they never got a Government permit for any of the booms, that Mr. Merchant told him it wasn't necessary (Tr. p. 158).

The necessity for obtaining the permits, the changes necessary to comply with the terms of the permits, etc., are testified to at pages 345 and 350 of the record. The permits and their requirements are found on pages 488 et seq. and the testimony of the U. S. Government Engineer regarding the necessity of obtaining these permits is found at page 494.

The court below recognized the importance of this

evidence in its opinion (p. 82) and says that the government requirements imposed a large amount of expense for reconstruction, that plaintiffs were unable to meet that expense, and that the booms without reconstruction with an open channel between them would be much less valuable than in their original condition. Having found them much less valuable in such condition, and having found their fair value when the logging company took them over to be $2000, it would seem to be logical at least to deduct from the $2000 the amount by which they would be depreciated by complying with the government requirements, and this without regard to the obvious error in excusing plaintiffs from non-performance either of its alleged contract by complying with its alleged contract and contributing to the expense of reconstruction, or from complying with the government requirements, because of their inability to meet the expense. The fact that they are unable to meet their contractual obligation and the requirements of law does not justify their enrichment at the expense of law, logic and litigants.

Much might be said about the admissibility of the old books of E. B. Dean & Co., which books and the entries therein were identified by witnesses who were children ten years old at the time the entries were made; the failure of the evidence adduced by plaintiffs to make out a case cognizable in equity, and other errors, but we believe we have sufficiently established that the decree of the court below should

be reversed and a decree entered in accordance with the prayer of the defendants' answer.

Respectfully submitted,

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Of Counsel.